2008

Salt Lake City v. James Francis Denier : Reply Brief

Utah Court of Appeals

CCO

Jan. 20, 2010

IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,	:	
Plaintiff/Appellee,	:	
v.	:	
JAMES FRANCIS DENIER,	:	Case No. 20081057-CA
Defendant/Appellant.	:	Appellant is not incarcerated

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for violation of a protective order, a class A misdemeanor under Utah Code Ann. § 76-5-108 (2008), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, presiding.

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James Denier challenges, on appeal, whether the trial court erred in allowing the City to present evidence in the form of hearsay in violation of Utah R. Evid. 804. Particularly, the trial court erred when it allowed Officer Degraw ("Degraw") to testify about a message left on Catherine Samuel's ("Samuel") answering machine. The trial court permitted Degraw to testify as to the content of that message. (R. 105:39,40.) However, the trial court ruled Degraw could not testify as to who left the recorded message. (R. 105:42.) The caller never identified himself and Degraw had not previously spoken with Denier. (R. 105:41.) Additionally, Denier challenges whether the trial court erred by ruling that the parties visitation order was not relevant to the case. (R. 105:102.)

The City, in its brief, first argues the recorded message was not hearsay because it was not being offered for the truth of the matter asserted or was an admission by a party-opponent. (City's Brief, 8.) In the alternative, the City then argues if the testimony was hearsay, it was admissible as an exception to the hearsay rule because it was a statement

against interest. (City's Brief, 12.) Finally, the City argues the trial court properly limited questions regarding the visitation order because the order was not relevant but if an err occurred it was ultimately cured. (City's Brief, 16.)

POINT I. DEGRAW'S TESTIMONY REGARDING THE STATEMENTS LEFT ON SAMUEL'S ANSWERING MACHINE DOES NOT FALL UNDER THE EXCEPTION TO ADMISSION OF HEARSAY, STATEMENT AGAINST INTEREST.

The City argues Degraw's testimony regarding the statements left on Samuel's machine, if considered hearsay, falls under an exception to the hearsay rule, (City's Brief, 12.) particularly, Utah Rule of Evidence 804 (b)(3). (Id.) The rule provides that if, at the time the statement was made, "it so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true", it is admissible. Utah Rule of Evid. 804 (b)(3). However, for the exception to apply, the declarant must be unavailable. Id.

Unavailability as a witness includes situations in which the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement . . ." Utah Rule of Evid. 804 (a)(1). "The Fifth Amendment privilege against self-incrimination "... comes into operation only where a specific question is asked." State v. White, 671 P.2d 191, 193 (Utah 1983) *citing* State In Interest of P.L.L., 597 P.2d 886, 889 (Utah 1979) (footnote omitted), (citation omitted). "An attorney for a witness cannot claim a privilege against self-incrimination; he can only advise the witness." State v. Anderson, 495 P.2d 804, 806 (Utah 1972) (citation omitted). "In order for the claim to be honored by the court, it must be made by the

witness." Id. at 806 (citation omitted). See also State v. White, 671 P.2d 191 (Utah 1983) (citation omitted).

The City argues Denier was unavailable due to privilege and as a result the statements left on Samuel's machine were admissible. (City's Brief, 12). In White, the defendant was convicted of aggravated robbery. State v. White, 671 P.2d 191 (Utah 1983) (citation omitted). During the jury trial, defense counsel called an inmate in the Salt Lake County Jail to testify. Id. at 192 (citation omitted). The inmate testified that he was acquainted with another inmate that had talked about White and about a robbery. Id. However, when defense counsel asked further about the conversation, the State objected on grounds of hearsay. Id. Defense counsel asserted that the inmate who made the statement would invoke his Fifth Amendment privilege. Id. Ultimately, the Court determined that the party in question must take the stand and personally assert that right for him to be deemed unavailable. Id. at 193 (citation omitted).

Unlike White, when Degraw testified, it was unclear if Denier would testify; defense counsel never stated he would invoke his Fifth Amendment privilege nor did Denier take the stand and invoke it. In fact, the defendant ultimately took the stand and testified on his own behalf. He was available and therefore the hearsay exception, statement against interest, is inapplicable.

However, even if the defendant was unavailable, Degraw's testimony regarding what was said on the recorded message should have been excluded because Degraw could not identify the caller. Officer Degraw responded to Samuel's house and listened

to the message. (R. 105:68.) He had never spoken to the complaining witness prior to this incident. The trial court determined that Degraw could not identify the caller because Degraw had neither spoken with Denier nor met him prior to this incident. (R. 105:41.)

The City asserts that "Samuel's testimony at the trial prior to Degraw's testimony provided corroboration that was trustworthy as she had heard the statements herself, she knew Denier for fourteen years, had spoken to him numerous time and knew his voice." (City's Brief, 13.) However, Degraw must establish who made the statement because he is the one testifying. The exception cannot be applied unless the caller can be identified and in this case the trial court determined that Degraw could not identify the caller. (R. 105:42.)

Finally, the statements made were not against the caller's interest. Any statement's made, when determining whether they are against a person's penal interest, are taken as a whole. State v. Webster, 2001 UT App 238, ¶ 14, 32 P.3d 976 (citation omitted).

In Webster, the defendant was convicted in the Third District Court for wrongful appropriation of a motor vehicle. Webster at ¶ 14. During trial, statements made by the defendant's wife to a detective were admitted under the hearsay exception Utah Rule of Evidence 804 (b), statement against interest. Id. at ¶ 14. The defendant's wife told the detective that her husband had driven the car in question two days prior to it being recovered. Id. at ¶ 15. When the detective told her the defendant denied ever driving the

car, she stated "we have a problem." Id. On appeal, the Utah Court of Appeals concluded the statement made was not against her penal interest and therefore was not admissible in court. Id. at ¶ 15. Her statements "were fully consistent with her own penal interest." Id. at ¶ 15.

Like Webster, the statements made were not against the defendant's penal interest. Degraw testified the male caller stated he knew this call was being recorded and he was talking about complaints that had been filed over the last eight or nine years. (R. 105:70.) He further stated that "this is about our son, not about you, not about me." The protective order prohibited contact between the parties with the exception of any contact regarding the visitation of their son. (R. 105:55.) The caller stated that this call was about their son and therefore the contact would not have been a violation of the protective order. (R. 105:55.) What Degraw heard, alone, would not be a statement against interest even if he could have identified the caller.

POINT II. THE VISITATION ORDER WAS RELEVANT AND THE ERROR WAS NOT CURED BY DENIER'S TESTIMONY.

The City argues the trial court did not err in excluding defense counsel's questions regarding the party's visitation order. (City's Brief, 13 and 16.) In support of their argument, the City argues the visitation order was irrelevant as it did not pertain to the violation of the protective order (City's Brief, 16.) and the message left on Samuel's telephone did not discuss visitation or custody. Id. Finally, the City argues that if there was an error it was cured when Denier testified that he had visitation every Wednesday and every other weekend. Id.

The error was not cured when Denier took the stand. Previously, Samuel testified that "there's nothing in my order that stipulates that I have to tell him when I go out of town with my child" and further testified she felt Denier was harassing her. (R. 105:49; R. 51:8-10.) (R.105:102.) Denier did testify to what he thought the current situation was. (R. 105:96.) He sees his son once or twice a year as "far as holidays are concerned" (R. 105:96.) That testimony was with regards to the "current situation." (R. 105:96.)

However, the visitation order was ultimately the legally binding document. If the visitation order permitted Denier to call their son during the holidays or ordered the parties to contact the other when they leave the state, it would have gone to the weight of Denier's testimony. It would have explained why Denier was inquiring where their son was and that the phone calls were an attempt to harass or violate the protective order but were within the limits of the visitation order and the protective order. Merely discussing what Denier's understanding of the current situation was not sufficient to remedy the trial court's error in not allowing him to discuss the actual visitation order.

CONCLUSION

Denier respectfully requests that this Court reverse the conviction and remand this case for a new trial.

RESPECTFULLY SUBMITTED this 4 day of December, 2009.

CHARITY SHREVE
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CHARITY SHREVE, hereby certify that I have caused to be delivered the original plus seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230; and 4 copies to the Salt Lake City Prosecutors Office, 349 South 200 East, Suite 500, P.O. Box 145500, Salt Lake City, Utah 84114-5500 this 4 day of December, 2009.

CHARITY SHREVE

DELIVERED this _____ day of December, 2009.